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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FAYE M. MARTIN, on behalf of herself
and others similarly situated,
Plaintiff-Petitioner,

against

THE CITY OF NEW YORK, *et al.*,
Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FAYE M. MARTIN, *pro se*
65 High Ridge Road, #215
Stamford, Connecticut 06905
203-593-7236/516-257-5393

59 pp

QUESTIONS PRESENTED:

I.

Did the Court of Appeals depart from accepted judicial procedure in dismissing the Plaintiff-Petitioner's *Canton v. Harris "municipal failure to train" cause of action which was uncontested by the Respondents in their motions to dismiss?**

II.

Does Commission Rule 1-40, which precludes a discrimination complainant from confronting evidence before a determination and dismissal on the merits of the complaint, contravene the Fourteenth Amendment's Due Process provisions?

III.

Did the Court of Appeals err in requiring a plaintiff asserting a procedural due process claim to demonstrate, as a threshold matter, that there exists a liberty or property interest which has been "100% extinguished" by the State?

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* 489 U.S. 378 (1989)

Parties

The parties to the proceedings below were the Plaintiff-Petitioner, FAYE M. MARTIN, (the "Petitioner"), and the Defendants-Respondents, RUDOLPH W. GIULIANI, the Honorable Mayor personally and in his official capacity as Mayor of the City of New York, NEW YORK CITY COMMISSION ON HUMAN RIGHTS, MEMBERS OF THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, MARTA VARELLA, Esq., personally and in her official capacity as Chair of the New York City Commission on Human Rights, (the "City Respondents") and PATTERSON, BELKNAP, WEBB & TYLER; STUART H. BOMPEY, Esq., ORRICK, HERRINGTON AND SUTCLIFF, ANTONIA GRUMBACH, personally and in her capacity as Managing Partner, DAVID DYKHOUSE, Esq., Personally, MEMBERS OF MANAGEMENT COMMITTEE OF PATTERSON, BELKNAP, WEBB & TYLER, individually and collectively, (the "Patterson Respondents").

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No:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FAYE M. MARTIN, ET AL.
Petitioners,

vs.

THE CITY OF NEW YORK, ET AL.
Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Faye M. Martin, appearing *pro se,* respectfully prays that a writ of certiorari issue to review the Amended Summary Order and Opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 12, 1997.

OPINIONS BELOW

The Amended Summary Opinion of the Second Circuit Court of Appeals is unreported and is reprinted in the appendix hereto at page A-1. The Opinion and Order of the United States District Court for the Southern District of New York adopting the Report and Recommendation of the Magistrate is reprinted in the appendix hereto at page A-9. The Report and Recommendation of the Magistrate is reprinted in the appendix hereto at page A-15.

JURISDICTION

This action challenges the pre-deprivation policies, practices and procedures of the New York City Commission on Human Rights (the "Commission") pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution. Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1332 and 1367. All claims were dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a cognizable claim.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The Fourteenth Amendment to the Constitution provides, in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law;

Commission Rule 1-40 provides:

> *Availability of Investigatory Materials*. (a) Upon an order of the Law Enforcement Bureau dismissing the complaint, complainant and respondent may examine the investigatory file in accordance with the provisions of subdivision (f) of § 1-22 of the chapter.[1]

STATEMENT OF THE CASE

The facts are set forth in the decision of the Court of Appeals and are briefly summarized below.

Summary of the Relevant Facts

In April 1992, Petitioner Faye M. Martin, a black female tax attorney, filed an employment discrimination claim with the Commission against her former employer, Patterson, Belknap, Webb and Tyler and several of its partners (the "Patterson Respondents"). The discrimination complaint, timely filed after nearly a year of unsuccessful settlement discussion, challenged the Petitioner's termination,

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[1] Commission Rule § 1-22 (f) prescribes the time, place and manner in which a party may review the investigative record.

specifically, and the Patterson Respondents' disparate termination of female and minority attorneys, in general. (Amended Complaint at ¶¶ 65-78).

Under Commission rules, before a discrimination complainant is entitled to an evidentiary hearing, the Commission's Law Enforcement Bureau must determine whether there exists probable cause to credit the allegations of the complaint. Determinations of probable cause should take no longer than 3 months. *(See* Travis, Jeremy, *Task Force Report on the New York City Commission on Human Rights,* January 1988, p. 63)[2] The Petitioner's discrimination complaint was detained for nearly 3 years without cause. (Amended Complaint at ¶102).

In June 1994, the Deputy Commissioner for Law Enforcement informed the Petitioner of the Commission's determination of "no probable cause." (Amended Complaint at ¶ 89). A "no probable cause" determination is a final adjudication upon the merits of the discrimination complaint.[3] (New York City Human Rights Law § 8-502; Brief on Appeal at 10).

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[2] The Task Force pilot program demonstrated that determinations of probable cause could be made in most cases in 9 weeks. Based on this program, the Task Force concluded that in no event should such determination take longer than 3 months.

[3] The Deputy Commissioner for Law Enforcement makes determinations of probable cause on behalf of the Commission. (Commission Rules 1-02, 1-51). Based on his determination, the action is dismissed without hearing. (City Human Rights Law § 8-113). There is no further entitlement to pursue the discrimination claim through either administrative or judicial processes. *Compare* EEOC Procedural Regulations, 29 C.F.R. § 1601.19 (1997) (after dismissal complainant entitled to "right to sue" letter to present action in federal court). While there is a right to appeal the Deputy Commissioner's determination, there is no right to *de novo* review of the record on appeal. (City Human Rights Law § 8-113(f)).

The Petitioner requested an opportunity to review and rebut the information upon which the no probable cause determination was based. Pursuant to Commission Rule 1-40, the Petitioner's request to confront any evidence gathered during the course of the investigation was denied. (Amended Complaint at ¶¶ 90-91).

[Unknown to the Petitioner, the Commission's determination of no probable cause contradicted the findings of the investigator. In September 1993, the investigator determined that there was probable cause to credit the Petitioner's allegations. (Memorandum of Investigator S. Jones to File No. 92-0600-Martin v. Patterson Belknap, September 27, 1993 (the "Findings Memorandum"); Plaintiff's Brief on Appeal at 16). After the investigator's findings, the prosecution of the complaint against the prominent law firm had been abandoned.]

Request for Withdrawal

After 9 months of additional inaction by the Commission, the Petitioner requested withdrawal of the discrimination case and demanded access to the investigative record under an alternative state statute. The request for access to the record was again denied. (Amended Complaint at ¶¶ 92-98). The request for withdrawal was held in abeyance until after the commencement of the instant action. (Amended Complaint at ¶¶ 98).

Release of The Investigative Record

The investigative record was released upon Order of the District Court in July 1995. The statistical evidence corroborated the Petitioner's allegations that female and minority associates were disproportionately terminated by the Patterson Respondents. (Brief on Appeal at 16-17). This

evidence, along with the investigator's Findings Memorandum, justified a determination of probable cause.[4] (Amended Complaint at ¶ 83, 87; Brief on Appeal at 16).

While the Findings Memorandum weighed in favor of the Petitioner, the investigator failed to document and preserve evidence in accordance with Commission guidelines. Among other things, witness statements were not verified or otherwise preserved through the use of affidavits or depositions. As a result of inadequate training and supervision, Commission employees never challenged the Patterson Respondents on their purported "loss" of certain of Petitioner's performance evaluations which were relevant to the investigation. (Amended Complaint at ¶ 82 , 83). The file reflected other flaws that are all too common in Commission proceedings.[5]

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[4] Under Commission Rules, if "a reasonable person, looking at the evidence as a whole, could reach the conclusion that it is more likely than not that the unlawful discriminatory practice was committed" a probable cause determination must be made. (Commission Rule § 1-52).

[5] *See Arrajo v. NYC Health/Hosp Corp, et. al.*, NYCCHR Compl. No. EM1120-04, Decision on Motion (March 11, 1994)(poor preparation of case including inconsistencies in allegations and failure of investigator to identify individual violator warrants dismissal); *Zea v. Northridge Coops*, NYCCHR Compl. No. FH- 557120690, Recommended Decision and Order (Nov. 23, 1993), *aff'd and dismissed*, Decision and Order (May 26, 1994)(Bureau failed to present any statistical data in disparate impact case); *Feinstein v. Emerald Car Service et al*, Compl. No. FH502089, Recommended Decision and Order (Feb. 2, 1994), *remanded for further investigation*, Decision and Order (March 16, 1994)(failure of investigator to determine whether address given by respondent was address of necessary party defendant); *.Nejman v. Sunnyside Home Care Project*, NYCCHR Compl. No. E92-0462, Recommended Decision and Order (March 1, 1993), *vacated and remanded*, Decision and Order (April 30, 1993), Recommended Decision and Order on Remand (January 11, 1994), *aff'd and dismissed* Decision and Order (March 16, 1994)(Commission failed to list witnesses, "counsel failed to establish prima facia case"); *Pinkham v. 141-25th Street Jackson Heights, Inc.*, NYCCHR Compl. No. E94-0633, Recommended Decision and Order (July 11, 1994) *remanded*, Decision and Order (Sept. 28, 1994), Recommended Decision

(footnote continued)

Claims Presented

Based on the above facts, the Petitioner challenges the Commission's case processing mechanism. The gravamen of the complaint is that the Petitioner's discrimination claim failed to receive the fair, accurate and orderly process that the Fourteenth Amendment guarantees. In this regard, the complaint is detailed and specific. It alleges:

(i) That Commission Rule 1-40 which precluded the Petitioner from confronting the evidence prior to a determination of no probable cause deprived her of *a meaningful opportunity to be heard* (Amended Complaint at ¶ 107-112); and

(ii) That needless delays resulting from Commission mismanagement and the recalcitrance of the Patterson Respondents deprived the Petitioner of the opportunity to be heard *at a meaningful time*. (Amended Complaint at ¶¶ 113-121).

The Petitioner challenges the City's failure to properly train and supervise its employees in the conduct of fair and

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and Order on Remand (Aug. 24, 1994), *aff'd and dismissed,* Decision and Order on Remand (August 24, 1994) (July 11, 1994)(bureau's pleadings and arguments "woefully insufficient" to withstand respondents Motion to Dismiss); *Gordon v. Khan,* Compl. No. AH92-0040, Recommended Decision and Order (August 24, 1993), *remanded,* Decision and Order (October 1993), Recommended Decision and Order on Remand (Nov. 10, 1994)(Commission failed to prove prima facia case on any of its allegations); *Osgood v. New York Telephone,* NYCCHR Compl. No. 06162176-EP, Decision On Motion (January 21, 1994), remanded Decision and Order (May 25, 1994), ("complaint so vague and riddled with apparent errors and ambiguities that it begs to be dismissed").

accurate investigations. As a result of inadequate training, a disproportionate 80% of completed investigations end with determinations of no probable cause.[6] Under *City of Canton v. Harris*, 489 U.S. 378 (1989) and *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992) the Amended Complaint unequivocally states a cause of action.[7] (Amended Complaint at ¶123-128; Plaintiff's Brief on Appeal at 5-6, 33-34).

Proceedings Below

Proceedings in the District Court

The District Court (Wood, J.) referred the case to Magistrate Judge Dolinger. All defendants filed Motions to Dismiss pursuant to FRCP 12(b)(6).

The Magistrate found no due process violation, concluding that since "neither the Commission nor anyone else deprived [the Petitioner] of her right to assert her claim or have it adjudicated, [the Petitioner] could not demonstrate the deprivation of any property, much less a failure under color of state law to provide constitutionally adequate procedures as a predicate to such deprivation." (Recommendation at Appendix ("A-") 23).

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[6] See p. 16-17, *infra*.

[7] Count III of the Amended Complaint alleges (i) that the City Defendants knew of recurrent errors and deficiencies in the conduct of civil rights investigations by Commission employees(¶ ¶ 102, 123); (ii) that such errors and deficiencies could have been arrested with proper training and supervision of Commission staff (¶¶ 82, 124) and (iii) that as a direct result of the City's failure to properly oversee and train Commission staff, the Petitioner and others similarly situated have been deprived of the fair, accurate and orderly investigation of their claims (¶¶ 125 -127) and determinations of probable cause to which they were justly entitled.

As to the constitutionality of Commission Rule 1-40, the Magistrate determined that "[a]ccess to government documents is not constitutionally mandated." (Recommendation at A-26). The Magistrate declined to address *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (right to confront evidence is basic tenet of due process) as urged by the Petitioner.

The Magistrate also found that the failure to train allegations lacked merit.

> A party entitled to due process may demand an unbiased decision maker and a fundamentally fair proceeding, but cannot invoke a constitutional right to a wise decision maker.
>
> (Recommendation at A-28).

The Magistrate declined to address *City of Canton v. Harris*, 489 U.S. 378 (1978) or the Petitioner's contention that the dearth of supervision and training negated the fundamental fairness of Commission proceedings.

The Petitioner filed an Objection to the Magistrate's Report challenging the Magistrate's refusal to address *Canton* and *Loudermill* and his failure to apply the prevailing procedural due process analysis of *Mathews v. Eldridge*, 42 U.S. 319 (1976).[8] The District Court (Wood, J.) adopted the

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[8] *See* Neuman, Gerald, *The Constitutional Requirement of "Some Evidence,"* 25 San Diego L. Rev. 631, 698 (1988)("Eldridge balancing has increasingly colonized the domain of due process"). Under *Mathews*, the Court must first, identify the property interest(s) at stake. Then the Court is required to determine whether the administrative process which adjudicates the interest(s) is sufficient by considering (i) the "private interest" affected by the official action, (ii) the risk of erroneous deprivation of such interest through the procedures used, and the probable value of any additional or substitute procedural safeguards, and (iii) the

(footnote continued)

Magistrate's Recommendation in its entirety addressing only the relevance of *Mathews*.

The District Court found that before *Matthews* can be applied a Plaintiff must, as a threshold matter, demonstrate that a property interest has been extinguished. (Amended Opinion and Order, A-13). Then and only then may the adequacy of an administrative process be tested under the *Mathews* tripartite analysis.

The District Court declined to address either *Canton* or *Loudermill*.

The Second Circuit Affirmance

In its Summary Order, the Second Circuit Court of Appeals affirmed the ruling of the District Court. In so doing, the Second Circuit panel declined to adhere to the standard articulated by this Court in *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454(1989) (threshold inquiry is whether there has been an "interference" with a property or liberty interest). On appeal, neither the City Respondents nor the Patterson Respondents addressed the *Canton* "municipal failure to train" allegations. This cause of action was nonetheless dismissed by the panel without comment.

A petition for rehearing and suggestion for rehearing *en banc* was filed requesting that the panel (i) address the heretofore unaddressed and uncontested *Canton* claim; (ii) reconcile its ruling with *Thompson* and *Loudermill;* (iii) reconcile its ruling with *Kraebel v. New York City Dept. of*

(footnote continued from previous page)

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews, 427 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d 18.

Housing, Preservation and Development, 959 F.2d 395 (2d Cir.), *cert. denied*, 113 S.Ct. 326 (1992)(due process must apply to the process regardless of outcome); and (iv) reconcile its ruling with a recent opinion (penned by Judge Jacobs, a member of the panel) which held that withdrawal from an adjudicative process in anticipation of an illegal or unconstitutional act does not negate a plaintiff's procedural due process claim. *See Finley v. Giacobbe*, 79 F.3d 1285, 1296 (2nd Cir. 1996).

The petition for rehearing was denied on May 15, 1997. In an Amended Summary Order entered on June 12, 1997 the Court of Appeals yet declined to address the issues presented by the Petitioner on appeal.

REASONS FOR GRANTING CERTIORARI

I. THE SECOND CIRCUIT COURT OF APPEALS HAS SO DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The Second Circuit Panel's Summary Dismissal Of The Uncontested Municipal Failure To Train Claim Pursuant To FRCP 12(b)(6) Was Improper.

To prevail on a FRCP 12(b)(6) Motion to Dismiss, the respondent must demonstrate beyond doubt that the plaintiff can prove no set of facts which would entitle him/her to relief. *Easton v. Sundram*, 947 F.2d 1011, 1014-1015 (2d Cir. 1991), *cert. denied*, 504 U. S. 911 (1992). With respect to the *Canton* "municipal failure to train" claims herein presented, both the City Respondents and the Patterson Respondents have failed as a matter of law to meet this standard.

None of the Respondents to this action have contested the viability of the *Canton* claim. As a result, the Amended Summary Order is devoid of any discussion of these claims and is noticeably absent any reference to the Respondents' contentions in this regard.

Since the viability of the *Canton* claim is undisputed, it is entitled to survive as a matter of law. The Second Circuit panel's dismissal of this claim contravenes established procedure and demands reversal by this Court.

B. The Second Circuit Panel's Disregard Of Established Supreme Court Precedent Was Improper.

In its Summary Order, the Second Circuit panel, without compelling citation or authority, holds that a procedural due process plaintiff must, as a threshold matter demonstrate "100% extinguishment" of a substantive claim or interest. This is not the prevailing rule of law established by this Court.

It is well established that the threshold inquiry in a procedural due process case is "whether there exists a liberty or property interest which has been *interfered with* by the State." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 459-460, 109 S.Ct. 1904, 1905, 104 L.Ed.2d 506 (1989) (*citing Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972) (*emphasis added*). The interference by the State need not rise to the level of a complete and final extinction of the individuals right, title and interest. *See Fuentes v. Shevin*, 407 U.S. 67, 84-85, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556 (1972) (temporary, non-final replevin of property in which plaintiffs had putative title was sufficient "encroachment" to violate due process concerns); *Kraebel v. New York City Dept. of Housing, Preservation and Development*, 959 F.2d 395 (2d Cir.), *cert. denied* 113 S.Ct. 326 (1992) (state's delay in processing plaintiff's claim of entitlement to rebate is sufficient "deprivation" to state cause of action). The Due Process clause prohibits actions of government which *abridge any* fundamental principle of liberty and justice. Tribe, *American Constitutional Law*, § 10-7, n.3 (2d ed. 1988).

Appellate Courts are not free to make new law in contravention of established precedent at whim. The refusal of the Second Circuit to adhere to the established standard for

review in procedural due process cases is improper and demands this Court's supervision.

II. THE PETITIONER'S CHALLENGE TO COMMISSION RULE 1-40 WHICH PRECLUDES A DISCRIMINATION COMPLAINANT FROM REVIEWING AND REBUTTING EVIDENCE PRIOR TO A DETERMINATION OF PROBABLE CAUSE STATES A COGNIZABLE CLAIM.

The Second Circuit Panel rules that the Petitioner's challenge to the constitutionality of Commission Rule 1-40 fails to state a cognizable claim. This is inconsistent with established due process jurisprudence.

The right of an individual to review and respond to evidence before the government makes a determination of rights and entitlements is an essential element of due process:

> The essential requirements of due process . . . are notice and an opportunity to respond. . . . . The [aggrieved party] is entitled to oral or written notice of the charges against him, an explanation of the [opposing party's] evidence and an opportunity to present his side of the story.
>
> *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct 1487, 1495, 84 L.Ed.2d 494 (1985).

The right to review the record and respond to evidence is critical in discrimination actions where subjective judgments along with issues of credibility and veracity predominate. As a result, the EEOC and some state agencies statutorily mandate

that discrimination complainants review the record before any determination on the merits of the complaint. *See* EEOC Procedural Regulations, 20 C.F.R. § 1601.22 (1997); Rules of the New York State Commission on Human Rights, 9 NYCRR § 456.6 (1997); Rules of the Connecticut Commission on Human Rights and Opportunities, Con. Gen. Stat. § 46a-83(b)(1997).

The Deputy Commissioner's determination of no probable cause is a final adjudication on the merits of the complaint. Based on the determination, the cause of action is terminated and the discrimination action is dismissed without hearing. Commission Rules 1-02, 1-51; New York City Human Rights Law § 8-113. Prior to such a determination, Commission complainants must be afforded the opportunity to confront the evidence on the record. This is what due process demands.

The Petitioner alleges that, pursuant to Commission Rule 1-40 she was denied the opportunity to confront evidence at any time before a determination was made with respect to her claim. Moreover, under such rule, the Petitioner would not be afforded such right prior to dismissal of her complaint. The Amended Complaint sufficiently alleges the deprivation of a constitutional right which is actionable, absent proof of any other harm or injury. *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053-1054, 55 L.Ed.2d 252 (1978)(denial of due process actionable without proof of actual injury). The Petitioner is fully entitled to challenge the constitutionality of a statutory provision to which she was subject. The Petitioner's withdrawal from the Commission's mechanism after the unconstitutional act does not extinguish her constitutional claim. See *Finley v. Giacobbe*, 79 F.3d 1285, 1296 (2nd Cir. 1996)

III. REVERSAL OF THE SECOND CIRCUIT PANEL'S SUMMARY ORDER IS WARRANTED BECAUSE OF THE SIGNIFICANCE OF THE CASE TO DISCRIMINATION COMPLAINANTS IN THE CITY OF NEW YORK.

This litigation is necessary to arrest the cycle of mismanagement and delay that has plagued the Commission for nearly 15 years. Despite the admonition of the Commission Task Force,[9] the criticisms of ineptitude from administrative law judges,[10] the mandates of the New York City Council,[11] and the laments of complainants,[12] inordinate delay[13] and gross incompetence continue to prevail.

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[9] The Commission Task Force states: "Currently, complainants alleging employment discrimination are not processed in a timely manner. Therefore, the involved parties are not ensured fair and equitable adjudication and the productivity of the Equal Employment Division is diminished." Task Force Report at 60.

[10] *See* note 8, supra.

[11] In 1991, the City Counsel adopted Commission Rule 1-44 which requires that probable cause determinations be made within 90 days. This rule was adopted based on the Task Force finding that most, if not all investigations could be completed in as little as 9 weeks.

[12] *See* Blair, "*Rights Case of Youth Counselor Takes 5 Years*," The New York Times, June 13, 1982, Section 1, Part 1, Page 41.

[13] *See Osgood v. New York Telephone*, NYCCHR Compl. No. 06162176-EP, Decision On Motion (January 21, 1994), remanded Decision and Order (May 25, 1994)(probable cause determination issued 11 years after filing). *See generally Macalena v. Empire Mutual*, NYCCHR Compl. No. 02103113, p. 7 (*citing El-Kilany v. NYC Mental Health & Mental Retardation and Alcoholism Services, et al.*, NYCCHR Compl. No. 8751-EG, Decision on Pre-Hearing Motion to Dismiss (September 26, 1989); *Greenstein v. Allied Maintenance Corporation*, NYCCHR Compl. No. 9670-EP, Decision on Pre-Hearing Motion to Dismiss (April 12, 1989)(referral to hearing after 11 years); *Carson v. Department of*

(footnote continued)

The record of the Commission as a civil rights enforcement agency is abysmal. Eighty percent (80%) of completed investigations end with determinations of no probable cause. [14]As a result of the City's failure to train and properly supervise its staff, a majority of such dismissals are unjustified. *See generally* United States General Accounting Office Report to Congressional Requesters, *EEOC and State Agencies Do Not Fully Investigate Discrimination Charges*, GAO/HRD-89-11, October 1988, p. 3 (majority of no probable cause determinations by state agencies are improper because critical evidence is not verified).

This action is necessary to insure that the efforts and attention of New York City are focused to give discrimination complainants the constitutional minimum: fair, accurate and orderly procedure for the resolution of their claims.

(footnote continued from previous page)

Social Services, et al., NYCCHR Compl. No. 0211572-EG, Decision on Pre-Hearing Motion to Dismiss (March 14, 1990)(8 year delay) and *Pfister v. French American Chamber of Commerce, et al.*, NYCCHR Compl. No. 02082011-EP, Decision on Motion to Dismiss (June 14, 1990)(8 year delay)).

[14] Of the 8,000 investigations completed between 1984 and 1993, only 621 (or 8%) ended with findings of probable cause. *See* New York City Mayor's Management Reports, 1984-1993. Even in the worst of civil rights agencies, 40 - 60% of completed investigations end with cause determinations in favor of the complainant. *See Task Force Report*, Appendix C, p .5. (Note: The number of probable cause findings is no longer reported by the agency.)

CONCLUSION

Wherefore, the Petitioner respectfully requests that the decision of the Second Circuit Court of Appeals dismissing all claims be REVERSED and that the case be allowed to proceed to discovery and a hearing on the merits of the claims.

Respectfully submitted,

Faye M. Martin, *pro se*
65 High Ridge Road, Suite 215
Stamford, Connecticut 06905
(203) 593-7236
(516) 257-5393

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMENDED SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June, one thousand nine hundred and ninety-seven.

PRESENT: HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
HON. DONALD P. LAY

Circuit Judges.

FAYE M. MARTIN, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

-v.-

96-7839

THE CITY OF NEW YORK, RUDOLPH W. GIULIANI, the Honorable Mayor personally and in his official capacity as Mayor of the City of New York, NEW YORK CITY

COMMISSION ON HUMAN RIGHTS, MEMBERS OF THE NEW YORR CITY COMMISSION ON HUMAN RIGHTS, MARTA VARELLA, Esq., personally and in her official capacity as Chair of the New York City Commission on Human Rights, PATTERSON, BELKNAP, WEBB & TYLER; STUART H. BOMPEY, Esq., ORRICK, HERRINGTON AND SUTCLIFF, ANTONIA GRUMBACH, personally and in her capacity as Managing Partner, DAVID DYKHOUSE, Esq., personally; MEMBERS OF MANAGEMENT COMMITTEE OF PATTERSON, BELKNAP, WEBB & TYLER, individually and collectively,

Defendants-Appellees.

*Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPEARING FOR PLAINTIFF-APPELLANT:	FAYE M. MARTIN, *pro se*, Brooklyn, NY.
APPEARING FOR DEFENDANTS-APPELLEES PATTERSON, BELRNAP, WEBB & TYLER; STUART H. BOMPEY; ORRICR, HERRINGTON AND SUTCLIFF; ANTONIA GRUMBACH; DAVID DYRHOUSE; MEMBERS OF MANAGEMENT COMMITTEE OF PATTERSON, BELRNAP, WEBB & TYLER:	JILL L. ROSENBERG, Orrick, Herrington & Sutcliffe LLP, New York, NY.
APPEARING FOR DEFENDANTS -APPELLEES CITY OF NEW YORK RUDOLPH A. GUILIANI, NEW YORK CITY COMMISSION ON	DEBORAH R. DOUGLAS, Assistant Corporation Counsel, Appeals Division (Paul

HUMAN RIGHTS; MEMBERS OF NEW YORK CITY COMMISSION ON HUMAN RIGHTS; MARTA VARELLA;	A. Crotty, Corporation Counsel of the City of New York), New York, NY.

Appeal from the United States District Court for the Southern District of New York (Wood, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Faye Martin appeals from the dismissal of her § 1983 complaint by the District Court for the Southern District of New York (Wood, J.), for failure to state a claim. After Martin was terminated by the law firm of Patterson Belknap, she filed a complaint with the New York City Human Rights Commission alleging discriminatory termination. After three years of what Martin calls delay, inaction, and ineffective action by the Commission, she withdrew her complaint and filed a complaint in federal court, alleging 1) various deprivations of procedural due process against the Commission, the City, and administrative officials, and 2) a deliberate pattern of obstruction and delay against Patterson Belknap and certain of its partners, rising to the level of state action.

Assuming the allegations in her complaint to be true, the facts are as follows: Faye Martin, a minority female attorney, was hired by Patterson Belknap in July 1988. Following two years of competent work, she angered members of the hiring committee by criticizing the firm's

hiring practices and treatment of a minority associate. She then received an unduly negative evaluation in November 1990, began to receive less interesting work, and was terminated in April 1991. She left at the end of June, and was replaced by a non-minority attorney.

One year later on April 3, 1992, Martin filed a discrimination charge with the NYC Human Rights Commission. The investigation was not assigned until August 1992, four months after she had filed the charge. Over the next two years, there were numerous delays in the investigation: the commission 1) failed to interview certain key witnesses; 2) interviewed witnesses incompletely; 3) failed to thoroughly document witnesses' responses; 4) failed to provide timetables, copies of the Human Rights Law, or the Commission's rules to Martin; and 5) failed to sanction Patterson Belknap for its improper behavior. Patterson Belknap, in turn, delayed giving information to the Commission, failed to provide certain information, and submitted false information.

In June 1994, Martin met with the Deputy Human Rights Commissioner, who told her that her complaint was going to be dismissed for lack of probable cause, and that any appeal would probably result in the finding being upheld. Martin requested and was denied access to the case file, on the ground that, under Commission Rule § 1-40(a), case file information is only released after the charge has been dismissed. On January 6, 1995, Martin filed a formal statement withdrawing her charge, which was still pending before the Commission at the time. That day, Martin also filed a written request under New York's Freedom of Information Law to review the file; no action having been taken for three months, the request is deemed to have been denied.

Martin filed a complaint in the District Court for the

Southern District of New York on February 1, 1995. The complaint was styled as a class action (as is this appeal), and raised § 1983 challenges against the constitutional sufficiency of the Commission's pre-hearing adjudicatory process. Against the Commission, the City of New York, and various administrative officials, Martin alleged that: 1) Commission Rule 1-40 (preventing complainants from seeing their casefile until the complaint has been dismissed) denies the class the right to confront evidence; 2) unexplained delays of three to ten years in the pre-hearing determination procedure deny class members their right to be heard at a meaningful time; 3) the Commission's failure to accord due process results from a failure to train, monitor, and supervise employees properly; and 4) the Commission's failure to provide complainants with its rules of procedure violates the due process right to notice. Against Patterson Belknap and various of its partners (the "Patterson defendants"), Martin alleged that they engaged in a deliberate pattern of obstruction and delay. Because the Commission acquiesced or cooperated, the conduct constituted state action, and denied the class members due process.

The district court (Wood, J.), referred the matter to Magistrate Judge Dolinger. In September 1995, all defendants filed motions to dismiss. On April 2, 1996, Magistrate Judge Dolinger issued a Report and Recommendation, recommending dismissal of all the federal claims. The Magistrate judge found that Martin had alleged the existence of a property right (a cause of action for discriminatory employment practices), but no deprivation of that right. Because Martin had withdrawn her complaint from the Commission, she--and no state actor--had essentially deprived herself of due process. This finding disposed of most of Martin's other claims.

Judge Wood adopted the Report and Recommendation in its entirety, but discussed separately

Martin's objection that the Magistrate Judge erred in failing to perform the Mathews v. Eldridge analysis for ascertaining violations of the right to due process. The district court observed that the Mathews analysis does not come into play until there has been a deprivation of a constitutionally-protected interest. In the absence of such a deprivation, there was no need for any determination of the appropriate level of process. All of the federal claims were dismissed with prejudice, and the state law claims were dismissed for lack of pendent jurisdiction without prejudice to refiling in state court, on June 19, 1996. The district court dismissed the complaint primarily for failure to allege a deprivation, as Martin herself had withdrawn her complaint.

On appeal, Martin argues, inter alia, that her complaint stated claims of 1) deprivation of due process, 2) failure to train Commission officials; and 3) that Patterson's conduct constitutes state action.

As a threshold matter, we address the question of whether Martin has alleged a deprivation of her rights. We conclude that she has not. For Martin to succeed on any of her constitutional claims, she must first allege the deprivation of a federal constitutional right. We conclude that the district court properly found that Martin alleged no such deprivation. Because Martin withdrew her complaint before the issuance of any decision by the Commission, she has been deprived of no right.

Martin contends that the Commission's delay in adjudicating her claim is itself a deprivation of her due process rights, and that "100% extinguishment" of her claim is not necessary to allege a deprivation. We disagree. Under Polk v. Kramarsky, 711 F.2d 505, 506 (2d Cir. 1983), a New York state agency's delay in processing a discrimination claim, without more, does not give rise to a § 1983 due process claim.

We have examined all of Martin's arguments and find them to be without merit. The judgment of the district court is AFFIRMED.

_____

HON. DENNIS JACOBS, U.S.C.J.

_____

HON. GUIDO CALABRESI, U.S.C. J

_____

HON. DONALD P. LAY, U.S.C.J

UNITED STATES COURT OF APPEALS
FOR THE SECONDCIRCUIT
UNITEDSTATESCOURTHOUSE
40FOLEYSQUARE
NEW YORK 10007

GEORGE LANGE III
PI FRK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15day of May one thousand nine hundred and ninety-seven.

Martin,

Plaintiff-Appellant

v Dkt No: 96-7839

City of New York,

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Faye M. Martin.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: _____
Beth J. Meador
Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAYE M. MARTIN, on behalf of herself and as a representative of others similarly situated

Plaintiff,.

v.

THE CITY OF NEW YORK; THE HON. RUDOLPH W. GIULIANI, personally and in his official capacity as Mayor of the City of New York; THE N_W YORK CITY COMMISSION ON HUMAN RIGHTS AND ITS COMMISSIONERS, personally and in their official capacities; MARTA VARELLA, ESQ., personally and in her official capacity as Chairperson of the New York City Commission of Human Rights; ANTONIA GRUMBACH, personally and in her capacity as Managing Partner; DAVID DYRHOUSE, personally; MEMBERS OF THE MANAG_MENT COMMITTEE OF PATTERSON, BELKNAP, WEBB & TYLER, individually and collectively; PATTERSON, BELKNAP, WEBB & TYLER; and others similarly situated,

Defendants

95 CIV. 707
(KMW)
ORDER

WOOD, D.J.

I hereby vacate my Opinion and Order of June 10, 1996. I am today issuing an Amended Opinion and Order, which corrects a typographical error as to the date on which the plaintiff, Faye M. Martin was hired at Patterson, Belknap, Webb & Tyler. I have changed the date from "1998" to "1988."

So Ordered.

Dated: New York, New York
June 5 , 1996

Kimba M. Wood
United States District Judge

A copy of this Order has been mailed to counsel for each of the parties.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAYE M. MARTIN, on behalf of herself and as a representative of others similarly situated,

Plaintiff,

v

THE CITY OF NEW YORK; THE HON. RUDOLPH W. GIULIANI, personally and in his official capacity as Mayor of the City of New York: THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS AND ITS COMMISSIONERS, personally and in their official capacities; MARTA VARELLA, ESQ., personally and in her official capacity as Chairperson of the New York City Commission of Human Rights; ANTONIA GRUMBACH, personally and in her capacity as Managing Partner; DAVID DYKHOUSE, personally; MEMBERS OF THE MANAGEMENT COMMITTEE OF PATTERSON, BELRNAP, WEBB & TYLER, individually and collectively; PATTERSON, BELKNAP, WEBB & TYLER; and others similarly situated,

Defendants.

95 CIV. 707 (KMW)
AMENDED
OPINION AND ORDER

WOOD, D.J.

In a Report and Recommendation (the "Report") dated April 2, 1996, Magistrate Judge Michael H. Dolinger recommended that the Defendants' motion to dismiss be granted and that the complaint be dismissed. Faye M. Martin ("Martin")[1] has filed objections to the Report, and the City Defendants (that is, the City of New York, Rudolph W. Giuliani, the New York City Commission on Human Rights ("the Commission") and its Commissioners, and Marta Varella) and the Patterson Defendants (that is, Antonia Grumbach, David Dykhouse, members of the Management Committee of Patterson, Belknap, Webb & Tyler, and Patterson, Belknap, Webb & Tyler) each separately filed responses.

After a de novo review of the Report, Martin's objections and the defendants' responses, I grant the defendants' motion to dismiss the complaint.

Discussion

The facts are fully set forth in the Magistrate Judge's Report, with which I will assume familiarity. The basic facts as alleged in the complaint are as follows: Martin, a member of a minority group, was hired by Patterson, Belknap, Webb & Tyler in July 1988; after being terminated as of June 30, 1991, Martin filed a discrimination complaint with the Commission in April, 1992; Martin withdrew her complaint

[1] Martin has brought this action on her own behalf and as a purported class action. The purported class has not yet been certified. Thus, in this matter I will treat Martin only as an individual plaintiff.

on January 6, 1995, after frustration with the delayed resolution of her case and the denial of access to her case file.

Martin brought this action against the City Defendants and the Patterson Defendants, alleging that they violated her right to due process in denying her access to her Commission case file and delaying the administrative processing of the discrimination claim that she filed with the Commission. Although Martin has raised several objections to the Report, I find that only one merits discussion: Martin argues that the Magistrate Judge erred in failing to perform the analysis required by Matthews v. Eldridge, 424 U.S. 319 (1976) to determine whether Martin's right to due process was violated.

Before undertaking the Matthews v. Eldridge analysis of what process is due, a court must first determine whether the aggrieved person was deprived of life, liberty or property by means of state action. See. e.g., Eldridge, 424 U.S. at 332. If the court decides that there has been such a deprivation, then and only then the court analyzes whether or not the administrative procedure violates due process by balancing the private interest affected by the action, the government's interest and the risk of erroneous deprivation of the interest. Id. at 335. The Magistrate Judge never reached an analysis of what process is due, because he determined that although Martin had a property interest in her employment discrimination claim, she was not deprived of the property by means of state action. Report at 12. Since Martin chose to withdraw her complaint from the New York City Commission on Human Rights, she, not the Commission, was responsible for the termination of her property interest.[2]

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[2] Martin claims that she was compelled to withdraw her complaint, because of the delay of the Commission and the fact that she was denied access to her file, and therefore was not responsible for the deprivation of her property interest. Plaintiff's Objections at 19, n. 13.

Conclusion

For the reasons set forth above, I adopt the Report in its entirety. Martin's federal claims are dismissed with prejudice. Her state-law claims are dismissed without prejudice to refiling in state court. See 28 U.S.C. S 1367(c); Carnegie Mellon Univ. Cohill, 484 U.S. 343, 350 n.7 (1988.).

So Ordered.

Dated: New York, New York
June 19, 1996

Kimba M. Wood
United States District Judge

A copy of this Order has been mailed to counsel for each of the parties.

However, the delay of the Commission and the inaccessibility of her case file do not constitute compulsion to withdraw her complaint. Martin's own decision to withdraw her complaint effected the termination of whatever property right she had in that claim

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAYE M. MARTIN, on behalf of herself and as a representative of others similarly situated,

Plaintiff,

V

THE CITY OF NEW YORK; THE HON. RUDOLPH W. GIULIANI, personally and in his official capacity as Mayor of the City of New York: THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS AND ITS COMMISSIONERS, personally and in their official capacities; MARTA VARELLA, ESQ., personally and in her official capacity as Chairperson of the New York City Commission of Human Rights; ANTONIA GRUMBACH, personally and in her capacity as Managing Partner; DAVID DYKHOUSE, personally; MEMBERS OF THE MANAGEMENT COMMITTEE OF PATTERSON, BELRNAP, WEBB & TYLER, individually and collectively; PATTERSON, BELKNAP, WEBB & TYLER; and others similarly situated,

Defendants.

REPORT AND
RECOMMENDATION

95 Civ. 707 (KMW)

TO THE HONORABLE KIMBA M. WOOD, U.S.D.J.:

Plaintiff Faye M. Martin is an attorney, who was formerly employed as an associate by the defendant law firm Patterson, Belknap, Webb & Tyler. In the wake of her termination in June 1991, she filed a discrimination charge with the New York City Commission on Human Rights. That charge, which was filed in April 1992, accused the Patterson firm of various forms of employment discrimination. The Commission never formally adjudicated the plaintiff's charge. Instead, on January 6, 1995, plaintiff withdrew the charge and filed a request for disclosure of documents under the New York State Freedom of Information Law ("FOIL"), N.Y. Pub. Off. Law §§ 84-90.

In the wake of these events, Ms. Martin filed the present lawsuit. Styled as a proposed class action, the complaint asserts a variety of federal and state law claims against the Commission and various of its officials, and against the Patterson firm and various of its partners.

All of the defendants have filed motions to dismiss, principally on the basis that plaintiff has not stated a cognizable federal claim. They also suggest that the state law claims are legally flawed and that-in any event they should be dismissed if the federal claims are found wanting. Finally, the City defendants argue that most of them have not been properly served.

For the reasons that follow, I recommend that the motions be granted and the complaint dismissed. Plaintiff's federal claims, which are said to arise under 42 U.S.C. § 1983, are fatally deficient in alleging a violation of due process. The balance of plaintiff's claims rests solely on the court's

supplemental jurisdiction, and they should be dismissed in the wake of the disposition of the federal claims.

A. General Standards for Assessing a Rule 12(b)(6) Motion

We start by noting that a Rule 12(b)(6) motion is addressed to the face of the complaint, and that in assessing such a motion we must assume the truth of all of the plaintiff's well-pled factual allegations, and must draw all reasonable inferences in her favor. See, e.g., Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995). So read, the complaint should be dismissed "only where 'it appears beyond doubt that . . .no set of facts' would permit recovery on plaintiff's claims." Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Staron v. McDonald's Corp., 51 F.3d 353, 355 (2d Cir. 1995). Moreover, this standard is to be applied with particular stringency in cares involving claims of civil rights violations. See, e.g, Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir.) (quoting Branum v.Clark, 927 F.2d 698, 705 (2d Cir. 1991)), cert. denied, 115 S. Ct. 73 (1994).

Bearing these standards in mind, I summarize in some detail the allegations found in plaintiff's amended complaint.

B. The Nature of Plaintiff's Factual Allegations

Plaintiff's complaint defines two separate spheres of alleged misconduct. One is principally the responsibility of the Commission, its officers and more generally the City; the other targets the Patterson firm and its partners.

The factual background, as alleged in the complaint, may be briefly summarized. Ms. Martin, who is a member of a minority group, was hired by the firm in July 1988, and performed with great competence. (Amended Complaint at 38-

40). In 1990, as a member of the firm's Hiring Committee, she criticized the firm's hiring practices and the way in which it treated at least one of its minority associates. (Id. at 41-45 & 47). Following these criticisms, which plaintiff implies offended several partners (Id. at 46, 48), she received a negative and quite unmerited evaluation in November 1990 (Id. at 49-54) and was subsequently denied responsible work and training. (Id. at 55-58). In April 1991 she was notified of her termination, effective June 30, 1991. (Id. at ¶59). Although she complained in accordance with firm procedures, her complaint was ignored and she left the firm at the end of June. (Id. at 60-63). The firm later replaced her with a non-minority attorney. (Id at 64).

In April 1992 plaintiff filed a discrimination charge with the New York City Human Rights Commission. (Id. at 78). The Commission, however, did not assign the charge for investigation until August 1992. (Id. at 79(a)). Thereafter the investigation was conducted neither swiftly nor thoroughly. According to plaintiff, there were a number of extended delays, and the investigators did not interview key witnesses, failed to elicit all pertinent information from those whom they did question, and failed adequately to document the witnesses' statements. (Id. at ¶79(b) & (c); 81-82). The Commission also failed to give plaintiff notice of the timeframes for processing her charge or to give her copies of the Human Rights Law and the Commission's Rules. (Id. at ¶ 80).

As for the Patterson firm, it repeatedly delayed providing information to the Commission, never provided some of the requested data, and submitted false information. (Id.. at ¶ 84).[1] Nonetheless, the Commission did not sanction the firm for its misconduct. (Id. at ¶85).

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[1]Although plaintiff accuses the law firm of providing false information to the Commission, the complaint does not indicate what information was false or in what respect it was untrue.

In June 1994, plaintiff requested a meeting with Deputy Human Rights Commissioner Randy Wills. (Id. at ¶88). At the meeting, Wills told her that the Commission was going to dismiss her complaint for lack of probable cause. He also informed plaintiff that she could appeal that dismissal, but that most appeals were denied, and that even when a case was remanded, further investigation usually confirmed the correctness of the initial dismissal. (Ids at ¶89).

Both at the meeting and some months later, in the Fall of 1994, plaintiff requested access to this investigative file of the Commission. On each occasion her request was denied on the basis of Commission Rule § 1-40(a), which permits disclosure only after dismissal of the charge, and not while the proceeding is pending. (Id. at ¶ 90-95).

On January 6, 1995 plaintiff filed a formal statement withdrawing her charge. (Id at ¶ 97). Prior to that time, the Commission had not dismissed the charge, which was still pending. On the same day plaintiff made a written request under FOIL to review the investigative file. (Id.). Although she received an acknowledgment from the Commission three months later of the withdrawal of her charge, the Commission did not act on her FOIL request, which is thus deemed denied under New York law. (Id. at ¶ 99-100).

Plaintiff also cites certain observations of a recent mayoral Management Report concerning the Commission. According to plaintiff, the report concluded that, as of October 1994, the Commission had 4,034 pending cases and that far more cases were being filed at that time than were being disposed of. Plaintiff estimates that the cited backlog would take more than five years to process. (Id at ¶103-06).

Based on the foregoing allegations, plaintiff proposes to represent four classes or subclasses and purports as well to define a defendant class. As for her claims, she seeks to define five federal and five state causes of action.

The four proposed classes are defined to track plaintiff's principal criticisms of the Commission's handling of her charge. Thus, they would encompass all complainants who are denied access to their investigative file ("Class A"), all complainants who do not receive an investigative disposition within ninety days of filing and an adjudicative disposition within ninety days of the determination of probable cause ("Class B"), all who may be "arbitrarily and capriciously" denied a timely determination of probable cause because of the incompetence or misconduct of the Commission' staff ("Class C"), and all those who will be denied a timely and correct determination as to probable cause because of misconduct by the accused employer (to be defined as a defendant class) and the complaisance of the Commission ("Class D"). (Amended Complaint at ¶21).

As for plaintiff's legal theories, she asserts five purported federal claims under 42 U.S.C. § 1983. The first is that the denial by the Commission of access to its investigative file during the pendency of a Commission proceeding constitutes a denial of an opportunity to be heard and hence a violation of due process. (Id. at ¶¶108-11). This claim is asserted solely against the City defendants.

The second claim rests on the contention that the Commission has violated the New York City Human Rights Law § 8-109 and Commission Rule § 1-44, which require investigations to be completed within ninety days after the filing of a charge. According to plaintiff, the City is responsible for these violations by virtue of its failure adequately to train and supervise Commission personnel.

Plaintiff contends that these delays constitute a separate denial of due process to complainants. (Id. at ¶¶114-20).

Plaintiff next complains of a pattern of erroneous decisions by Commission staff in the investigation and prosecution of discrimination charges. Again she cites the City's alleged failure to provide adequate training and supervision of Commission employees, and claims that these errors amount to a denial of due process. (Id. at ¶¶123-27).

Plaintiff's fourth claim rests on the assertion that local law in the form of section 8-109 of the Human Rights Law and Commission Rules ¶¶1-ll(c) and 1-44 requires the Commission to provide certain information to complainants and that the Commission has failed to comply with these requirements. Once more, plaintiff asserts that these violations of local law constitute a denial of federally-guaranteed due process. (Id. at ¶¶ 130-33).

The remaining federal claim is directed at the proposed defendant class, that is, a class consisting of employers who, when charged before the Commission, engage in a deliberate pattern of obstruction and delay. According to plaintiff, the City defendants know or should know of such misconduct and deliberately permit or condone it. Plaintiff asserts that the alleged misconduct, although attributable to private parties, constitutes state action because of the Commission's acquiescence or cooperation, and denies complainants due process. (Id. at ¶¶ 136-40).

The balance of plaintiff's claims are labeled as state-law theories. They include "Tort Claims for Misfeasance, Malfeasance and Nonfeasance of Administrative Duties" (Count VI), "Obstruction of Justice by the defendant class (Count VII), and violations of the New York Human Rights Law by the Patterson firm in its retaliatory and discriminatory

actions taken against plaintiff (Counts VIII, IX and X). (Amended Complaint at ¶¶ 143-60).

Based on these claims, plaintiff seeks class-wide declaratory and injunctive relief separately against the Commission and against the Patterson and class defendants. She also seeks compensatory and punitive damages against all defendants, as well as attorney's fees. (Id. at ¶¶162-72).

C. Assessment of Plaintiff's Federal Claims

As noted, all of plaintiff's federal claims rest on the theory that delays, errors and violations of Commission rules and local law by Commission staff members and by the Patterson firm defendants deprived plaintiff of her federally-protected right to due process. To assess this theory we must start with the premise that entitlement to due process protection depends upon whether the aggrieved person has been denied "life, liberty or property". The Fifth and Fourteenth Amendments guarantee procedural protection only in the face of such a loss. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); Kelly Kare. Ltd. v. O'Rourke, 930 F.2d 170, 175 (2d Cir.), cert. denied, 502 U.S. 907 (1991).

Plaintiff argues, at least in part, that the City law creating a cause of action for discriminatory conduct by an employer constitutes property and that the alleged actions of the Commission staff and the Patterson firm deprived her of that cause of action in a manner so unfair or contrary to law (presumably local law) as to amount to a deprivation without due process. The first element of this analysis is legally sound, but the second part fails as a matter of law.

In Logan the Supreme Court concluded that a local law creating a cause of action for discriminatory employment practices was the source of a property right and hence triggered

due process protections. 455 U.S. at 428-32. The Court therefore concluded that a complainant who asserted such a claim under the state's statutorily defined administrative procedure could not be deprived of his claim without minimally adequate procedural protections. Id. at 433-34.

In that case the plaintiff had lost the right to press his claim solely because the administrative agency in question had failed to hold a fact-finding conference within 120 days after the filing of the charge. Since that failure was entirely the fault of the agency and not in any sense attributable to the complainant, the Court held that the statutorily-prescribed preclusion of plaintiff's claim constituted a deprivation of property without due process. Id. at 434-35.

The facts alleged in this case by plaintiff are crucially distinguishable. Although the Commission failed to open or complete its investigation of plaintiff's charge within the time limits set by local law and its own rules, that failing did not deprive plaintiff of her property, that is, her claim against the Patterson firm. Indeed, since neither the Commission nor anyone else deprived her of the right to assert her claim and have it adjudicated, she cannot demonstrate the deprivation of any property, much less a failure under color of state law to provide constitutionally adequate procedures as a predicate to such a deprivation.

Under New York City's Human Rights Law, plaintiff was entitled to file a charge and have it heard and decided by the Commission. New York City Administrative Code §§ 8-101 et. seq. Under the terms of the Administrative Code, if the Commission initially determined that plaintiff's claim lacked probable cause, it would issue a formal dismissal order. Admin. Code § 8-113(d). In the wake of such an order, plaintiff would have been entitled to file an Administrative appeals See Admin. Code § 8-113(f). If the Commission's decision on appeal was adverse, plaintiff had the right to

judicial review by the New York State Supreme Court and then, on further appeal, by the Appellate Division. See Admin. Code § 8-123.

As plaintiff concedes, she formally withdrew her claim rather than await its adjudication by the Commission and, if necessary, by the courts. Although we may infer that she chose to withdraw the charge because she was frustrated with the delay or even assumed that she would lose in the end, she herself was responsible for the termination of whatever property right she had in her claim.

This set of circumstances cannot give rise to a due process claim As the Second Circuit has noted in equivalent circumstances, "Logan stands for the proposition that if the state creates a statutory entitlement, due process concerns require that the entitlement not be destroyed without some opportunity for a hearing." Polk v. Kramarsky, 711 F.2d 505, 508 (2d Cir.), cert. denied, 464 U.S. 1000 (1983). As in Polk, however, delay by the agency is not tantamount to rejection of the claim without a hearing. See id. at 508-09 (noting that plaintiff not only had pending Title VII suit, but had not appealed state agency's dismissal of his administrative complaint).

Plaintiff does not allege that the Commission simply refused to process her claim[2]. All that she asserts is that it

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[2] In such a case plaintiff would presumably have had a remedy under New York law in the form of a mandamus petition to compel the Commission to act. See, e.g., New York Public Interest Research Group v. Dinkins, 83 N.Y.2d 377, 386-87, 610 N.Y.S.2d 932, 936-37 (1994); Kupersmith v. Public Health Council of State, 101 A.D.2d 918, 919, 475 N.Y.S.2d 619, 621 (3d Dep't 1984), aff'd. 63 N.Y.2d 904, 483 N.Y.S.2d 211, rearg. denied & dismissed., 64 N.Y.2d 755, 885, 1013, 485 N.Y.S.2d 1030, 487 N.Y.S.2d 1029, 489 N.Y.S.2d 64 (1985); Lisa v. Board of Elections of City of New York, 83 A.D.2d 949, 950, 442 N.Y.S.2d 791, 792-93 (2d Dep't 1981).

failed to meet the time deadlines imposed by its own rules and by City statute. But the Due Process Clause does not constitutionalize state or local procedural rules, and even extended delay does not contravene the constitutional guarantee. Id. at 509 (finding no due process violation from five-year agency delay); Isaacs v. Bowen, 865 F.2d 468, 477 (2d Cir. 1989) (19-month delay between initiation of Medicare claim and review by administrative law judge does not violate due process -- "[r]egrettably, delay is a natural concomitant of our administrative bureaucracy."); Littlefield v. Heckler, 824 F.2d 242, 247 (3d Cir. 1987) (nine-month delay between decision of administrative law judge and appeals council not violative of due process); Givens v. United States Railroad Retirement Bd., 720 F.2d 196, 201 (D.C.Cir. 1983) (19-month delay in processing claim for retirement benefits not violative of due process), cert. denied, 469 U.S. 870 (1984). But see Kelly v. Railroad Retirement Bd., 625 F.2d 486, 490 (3d Cir. 1980) (three year-and-nine-month delay in processing disability application held unconstitutional). All that due process requires is that if state or local law creates a property entitlement, the government cannot take away that entitlement without following procedures defined by federal due process standards. See, e.g, Kraebel v. N.Y.C. Dept. Of Housing, Preservation and Dev., 959 F.2d 395, 404-05 (2d Cir.), cert. denied, 506 U.S. 917 (1992); Kelly Kare. Ltd., 930 F.2d at 175.

Apart from delay, plaintiff offers principally two complaints about the way in which the Commission handled her charge. First, she notes that consistent with a Commission rule she was denied access to the Commission's investigative file during the pendency of her charge. Second, she alleges that, contrary to the Commission's rules, she was not given a copy of the Human Rights Law and Commission

rules and was not given a timetable for completion of various stages of the agency proceeding. None of this implicates any constitutional rights.

Access to governmental documents is not constitutionally mandated. See Houchins v. KOED. Inc., 438 U.S. 1, 14 (1978) ("There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy." ' (quoting Stewart, "Or of the Press," 26 Hastings L.J. 631, 636 (1975))); see also DeLuise v. North Bronx Westchester Neighborhood Restoration Ass'n. Inc., 1991 WL 130893, *4 (S.D.N.Y. July 8, 1991) (finding no constitutional basis to plaintiffs' claims seeking disclosure under the Freedom of Information Act . Moreover, plaintiff fails to suggest that the challenged Commission rule, which applies equally to all parties to the Commission proceeding, denied her the right to have her claim heard.[3] Whether plaintiff would have been advantaged by mutual access to the Commission's file is both speculative and simply not relevant

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[3] Although not explained in the record, the rule in question seems designed to give the Commission's investigators some latitude to obtain candid statements from witnesses, by freeing the witnesses from the fear that one or another of the parties might retaliate against them or attempt to intimidate them if their statements were disclosed during the agency proceeding. Cf. Ortiz v. United States Dent. of Health & Human Servs., 70 F.3d 729, 732 (2d Cir. 1995) (information compiled for law enforcement purposes may be withheld from disclosure under Freedom of Information Act in order to protect confidential sources from retaliation that may result from revealing their participation in law enforcement activities); United Technologies Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985) (exemption from disclosure is meant to encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential). This type of protection is not at all unprecedented in agency proceedings. See, e.g., Jolly v. New York City Dept. of Corrections, 1989 WL 153053, *4-5 (S.D.N.Y. Dec. 13, 1989) (Inspector General's investigative file is confidential and no one except designated investigative personnel is given access to the file).

to a constitutional analysis. Cf. Polk, 711 F.2d at 509 (noting uncertainty as to which party was prejudiced by agency delay).

In any event, as noted, plaintiff herself terminated her claim before a hearing, and she alleges no facts even remotely suggesting that she was compelled to do so by virtue of the inaccessibility of the Commission file. The implausibility of such a theory is further underscored by the fact that if plaintiff had waited until the Commission dismissed her charge -- if in fact that was the ordained result -- she would have been entitled to see at least the nonprivileged portions of-the file and to use whatever she found in it to assist her in any judicial review that she chose to pursue under local laws.[4]

Plaintiffs complaints about the non-disclosure of the Commission's rules and the statute, as well as its alleged failure to give her a timetable, are of still less consequence. As noted the Commission's failure to abide by its own procedural rules or by local procedural law does not by itself implicate the Due Process Clause. Moreover, plaintiff does not even vaguely indicate how these failings by the Commission deprived her of her right to a hearing on her statutory claim. The short answer is that they plainly did not.

Plaintiff's remaining complaint directed solely at the Commission is stated only in general terms but amounts to the assertion that the staff is incompetent and poorly trained and as a result frequently makes erroneous decisions. This assertion does not advance plaintiff's position for at least two reasons.

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[4]If the Commission had refused in those circumstances to provide such access under FOIL, plaintiff could have sought judicial review under CPLR Article 78. Although she alleges in her amended complaint that the Commission ignored her request for access even after the withdrawal of her charge (Amended Complaint at ¶ 100), she does not indicate that she ever exercised her available judicial rights under New York law to challenge this failing.

First, since plaintiff terminated her proceeding voluntarily before even a probable cause decision had been rendered she plainly lacks standing to complain about the quality of Commission decisions. See, e.g., Deeper Life Christian Fellowship. Inc. v. Sobol, 948 F.2d 79, 81 (2d Cir. 1991) (once plaintiff settled its claim against defendant, it lacked standing to challenge constitutionality of state statute).[5] Second, the rendering of foolish or erroneous decisions by a state agency does not violate the aggrieved party's right to due process. A party entitled to due process may demand an unbiased decisionmaker and a fundamentally fair proceeding, but cannot invoke a constitutional right to a wise decisionmaker. See, e.g, McDarby v. Dinkins, 907 F.2d 1334, 1338 (2d Cir. 1990); Alfaro Motors. Inc. v. Ward, 814 F.2d 883, 888 (2d Cir. 1987). Otherwise stated, the fact that an agency decision is arbitrary or capricious may trigger statutory review and correction, see, e.g., N.Y. Civ. P. L. & R. Art. 78; 5 U.S.C. 704, but it does not ordinarily rise to the level of a constitutional tort. See, e.g., Alfaro, 814 F.2d at 888.

Plaintiff's analysis is also inconsistent with the long line of decisions holding that even though an agency's action, if not subject to correction, might work a constitutional violation, the provision of a procedure to review the action is all that is required by due process. E.g., Parratt v. Taylor, 451 U.S. 527 (1981) (post-deprivation remedy), overruled on other grds. by

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5The fact that, as alleged in the complaint, a Commission representative informed plaintiff in June 1994 that probable cause would be denied is immaterial. Such a prediction is of course not binding on the Commission, and by the time that plaintiff withdrew her charge seven months later, the predicted decision had not been rendered. Moreover, even if it had the plaintiff would have been entitled to both an administrative appeal and judicial review, and the representative who allegedly gave plaintiff the pessimistic assessment alluded to in the complaint could not speak for the appellate agency reviewers, much less the state courts.

Daniels v. Williams, 474 U.S. 327 (1986). As noted, even if the Commission had chosen to terminate plaintiff's claim and to do so in a patently unfair proceeding, plaintiff could have availed herself of agency appellate and judicial review, thus satisfying the constitutional requirement that the complainant be afforded some form of reasonably fair hearing before being finally deprived of a property right.

Plaintiff's remaining federal claim targets principally the Patterson firm and its partners. She asserts that the firm deliberately delayed responding to requests for information by the Commission, ultimately provided only partial responses, and in some unidentified respects gave false information to the Commission. The initial difficulty with couching this claim as one for denial of due process is that the Patterson defendants are private parties and cannot be deemed, by themselves, to have been acting under color of state law, as required for liability under 42 U.S.C. § 1983 and under the Fifth and Fourteenth Amendments. See, e.g., West v. Atkins, 487 U.S. 42, 49-50 (1988); Rendell-Baker v. Kohn, 457 U.S. 830, 837-38 (1982); Annunziato v. The Gan. Inc., 744 F.2d 244, 249-50 (2d Cir. 1984); Leeds v. Meltz; 898 F.Supp. 146, 148 (E.D.N.Y. 1995). To overcome this problem, plaintiff alleges in entirely conclusory terms that the Commission, concededly a state actor, acquiesced in or condoned this behavior.

Although civil rights pleadings are entitled to a fairly liberal reading on a Rule 12(b)(6) motion, the current complaint does not meet even minimal standards for pleading facts sufficient to ensnare a private party as a section 1983 defendant. "Actions by a private party are deemed state action if 'there is a sufficiently close nexus between the State and the challenged action' that the actions by the private parties 'may be fairly treated as that of the State itself.'" Chan v. City of New York, 1 F.3d 96, 106 (2d Cir.) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)), cert. denied, 114 S. Ct. 472 (1993). The "close nexus test is not

satisfied on the basis that the state "'approved] of or acquiesce[d] in the initiatives'" of the private entity. San Francisco Arts & Athletics. Inc. v. United States Olympic Committee, 483 U.S. 522, 547- (1987) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982)). Since that is all that plaintiff appears to allege the pleading is at least arguably deficient on this basis alone.

In fairness to plaintiff, we note that her complaint might be read as attempting to assert more than passive approval by the Commission. Since the alleged misconduct of the Patterson defendants might have had a direct impact on the performance of the Commission's job -- in the form of its decisionmaking process -plaintiff may be heard to argue that the intertwining of the private defendants with the state actors was more intimate than in at least some other cases.

There are several problems with this approach. Most obviously, the fact that a private actor's failings or misconduct may have an effect on public function does not by itself provide a basis for holding the private actions to have been taken under color of state law. An analogous circumstance is that of a public defender whose performance in representing his impecunious client is so incompetent as to lead to the client's criminal conviction. Although the attorney's actions or inactions presumptively affected the decisions of the judge or jury and those decisions constituted action under color of state [sic], the actions of the public defender are not thereby transformed into state action for purposes of section 1983. See, e.g., Polk County v. Dodson, 454 U.S. 312 (1981).[6] See also

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[6] We must distinguish between the liability of the attorney under Section 1983, and the liability of the state as respondent in the context of a habeas petition premised on a claim of ineffective assistance of counsel. By virtue of having convicted defendant without having afforded him a constitutionally adequate attorney, the state may be called to account under 28 U.S.C. 2254 and compelled to provide the defendant a new trial. See, e.g., Strickland v. Washington, 466 U.S. 668, 698 (1984).

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 196 (1988).

Even if we read the complaint as seeking to assert that the Patterson defendants acted, in effect, "in concert with" the Commission, plaintiff's allegations must fail. In this respect she says nothing more than that the Commission acquiesced in the Patterson firm's misconduct and that the defendants engaged in unspecified "cooperative and interdependent acts . . . ." (Amended Complaint at ¶¶138-39). Such a conclusory allegation of conspiracy or concerted action is inadequate, even under the fairly loose standards of Rule 8(a) to state a claim under section 1983. See, e.g., Spear v. Town of West Hartford, 954 F.2d 63, 68 (2d Cir.) cert. denied. !06 U.S. 819 (1992).

If this were the only problem with the plaintiff's articulation of her fifth claim, we might be compelled to recommend dismissal without prejudice since a lack of specificity is a potentially correctable flaw. See, e.g., Atkins v. Publications Int'l. Ltd., 1992 WL 309581, *2 (S.D.N.Y. Oct. 15, 1992), (dismissing plaintiff's fraud claim without prejudice to plaintiff's ability to replead the claim with sufficient particularity). The other key problem with the claim, however, is fatal to its prospects.

As noted, plaintiff cannot point to any deprivation of a property right, either by the Commission or by any other defendant. That being the case, she cannot possibly sustain a due-process claim for misconduct by the Patterson defendants in discovery before the Commission. Even if such conduct could be attributed to a defendant acting under color of state law and even if it were so egregious as to violate due-process standards if the Due Process Clause were applicable to plaintiff's Commission proceeding, the absence of any deprivation of property, makes that clause inapplicable by definition.

In sum, plaintiff's allegations fail to state a cognizable federal claim. Moreover, for the reasons noted, any effort to amend the complaint to articulate such a claim would be an exercise in futility. Accordingly, dismissal of these claims should be with prejudice. See, e.g, Ragland v. Abate, 1996 WL 94565, *4 (S.D.N.Y. Mar. 5, 1996); Benedict v. Amaducci, 1995 WL 702444, *9 (S.D.N.Y. Nov. 28, 1995).

D. The Plaintiff's State-Law Claims

The remaining claims in this case all are a product of state law. Although defendants invite the court to address these claims on the merits, that would be inappropriate.

Those claims are before this court based solely on the tendency of the legally deficient federal claims. If the federal claims are to be dismissed, as they should, the state-law claims should be dismissed without prejudice to refiling in state court. See 28 U.S.C. § 1367(c); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988); Martz v. Incorporated Village of Valley Stream, 22 F.3d 26, 32 (2d Cir. 1994)

CONCLUSION

For the reasons stated, I recommend that defendants' motion to dismiss be granted, that the federal claims be dismissed with prejudice and that the state-law claims be dismissed without prejudice to refiling in state court.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten day (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable Kimba M.

Wood, Room 1610, and to the chambers of the undersigned, Room 1670. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. See Thomas v. Arn, 474 U.S. 140, 150 (1985), reh'g denied, 474 U.S. 1111 (1986); IUE AFL-CIO Pension Fund v. Hermann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 115 S. Ct. 86 (1994); Small v. Secretary of Health and Human Services, 892 F.2d 15, 16 (2d Cir.1989); 28 U.S.C.A. S 636(b)(1)(West Supp. 1993); Federal R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York
April 2, 1996

RESPFCTFULLY SUBMITTED,
MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Report and Recommendation have been mailed this date to:

Faye M. Martin, Esq.
122 Fourth Avenue
Brooklyn, New York 11217

Stuart Bompey, Esq.
Orrick, Herrington & Sutcliffe
599 Lexington Avenue
New York, New York 10022

David Goldin, Esq.
Corporation Counsel of the City of New York
100 Church Street, Room 3-165
New York. New York 10007